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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 719

CONVOY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

Certificates authorizing interstate motor transportation of automobiles are generally limited either to "initial authority," which authorizes movements of new automobiles from manufacturing or assembly plants, or to "secondary authority," authorizing all other movements. Such classifications, however, reflect an older pattern of transportation of automobiles—trans-

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portation entirely by motor carriers. In recent years, this pattern has changed radically as the result of the advent of coordinated rail-motor service.[1] New automobiles now move from the manufacturing or assembly plant largely by rail for the line-haul movement, with the motor carrier portion of the transportation limited to the short hauls to or from the railheads.

Responding to the changed situation, the Commission in *National Automobile Transporters Association, Petition for Declaratory Order,* 91 M.C.C. 395 (*NATA*), issued a comprehensive ruling clarifying the status of motor carriers in regard to coordinated rail-motor movements. The Commission first ruled that where the traffic leaves the point of origin by rail, a motor carrier holding initial authority is not authorized to perform the remaining motor portion of the movement, *i.e.,* from the destination railhead to the consignee. Second, noting that the new pattern of rail-motor transportation of automobiles has caused a sharp decrease in the tonnage and revenues of motor carriers with initial-authority certificates, the Commission ruled that such a motor carrier might use an expedited procedure to secure a modification of its "initial authority" certificate permitting it to handle the motor portion of its own former traffic. But such modification—which could be secured upon a showing of the volume and routing of movements before and after the introduction of coordinated rail-motor service (91

[1] Trailer-on-flatcar service ("TOFC") and multi-level rail car service ("MLRC").

M.C.C. at 415)—would be permitted "only to the extent necessary to enable a petitioner to continue to participate in the remaining motor movement [of its own former traffic], and not to encroach on the rights of other existing carriers" (*id.* at 416). The Commission expressed the hope "that such petitions can be disposed of with a minimum of expense and effort for all concerned, and perhaps without oral hearing" (*ibid.*).

The Commission's orders here in issue (J.S. App. B.) granted the petition of Commercial Carriers, Inc., for a limited modification of its motor common carrier certificate pursuant to the *NATA* ruling. Under its certificate, Commercial was authorized to transport new automobiles from the Chrysler plant in Detroit to certain points in Oregon. The sole effect of the modification was to permit Commercial to substitute multi-level rail car service (see n. 1, *supra*) for the beginning portion of its formerly all-motor movement. The three-judge district court unanimously sustained the Commission's orders, holding that they "are supported by substantial evidence and are not arbitrary or capricious," and that the decision in *Motor Convoy, Inc.* v. *United States,* 235 F. Supp. 250, affirmed *per curiam,* 381 U.S. 436, in which similar orders were sustained, "is persuasive" (J.S. App. A., pp. i–ii).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court. The Commission's orders were issued pursuant to criteria

and procedures upheld only last Term by the Court. *Motor Convoy, Inc.* v. *United States, supra.* The principal legal and factual issues raised by appellant were there presented and decided.

1. Appellant argues (J.S. 11–12, 15–18) that the limited modification granted Commercial Carriers to enable it to participate in coordinated rail-motor movements between the points named in its certificate should be treated the same as the grant of a *new* certificate of public convenience and necessity, and that the Commission, therefore, was required to conduct a hearing for the purpose of determining whether the new service was required by the shipping public and whether the services of the protesting carriers, such as appellant, were inadequate. However, as expressly held in *Motor Convoy,* the kind of limited modification granted by the Commission here, restricted as it is to the precise traffic Commercial Carriers transported prior to the advent of coordinated rail-motor service,[2] does not enable the carrier to

[2] Verified statements filed by Commercial Carriers and not disputed by appellant showed the volume and routing of Chrysler traffic transported by Commercial Carriers from Detroit, Michigan, to points in Oregon both before and after the shift to coordinated rail-motor movement, in which the traffic moves by rail from the plants in Detroit to Portland, Oregon, and thence by motor to other points in Oregon. The modification granted by the Commission authorizes Commercial Carriers to transport automobiles in "secondary movements" from Portland to other points in Oregon but restricts it to the movement of "automobiles manufactured or assembled at plants of the Chrysler Corporation at Detroit, Mich., and having an immediately prior movement by rail"—thus strictly limiting Commercial to the remaining motor portion of its own former traffic (J.S. App. B., p. v).

institute a new service in competition with other carriers, and hence the standards for determining whether a new certificate should be issued are wholly inapplicable. "The need for the transportation by [applicant] had previously been established and [applicant] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." *Motor Convoy, Inc.* v. *United States, supra,* 235 F. Supp. at 253. Carriers such as the present appellant "would not be affected by the situation" (*ibid*), since the modification merely permits Commercial to carry its own former traffic, not appellant's traffic, and creates no new service to compete for appellant's traffic.

2. Appellant next argues (J.S. 15–18) that the Commission's orders are inconsistent with the doctrine that new common carrier authority will not ordinarily be granted to permit a carrier to "follow the traffic" of a particular shipper. *Smith & Solomon Trucking Co., Extension,* 61 M.C.C. 748, sustained, 120 F. Supp. 277. The same contention was rejected in *Motor Convoy,* and is clearly without merit. The doctrine has to do with new certificates; its object is to prevent a disruption of "the existing competitive situation, since the new carrier's operation in such territory cannot be restricted." 61 M.C.C. at 753. As noted earlier, in the present case the limited modification granted by the Commission creates no new competition; hence, the *Solomon* doctrine is inapplicable.

3. Appellant finally[3] contends (J.S. 3, 8–9)[4] that the *NATA* decision has been impaired by subsequent proceedings wherein the Commission has been investigating the general subject of "piggyback" service in the movement of automobile and other traffic. But one of the two subsequent proceedings, *Ex Parte No. 230,* does not even involve the carriage of automobiles; the other, *Ex Parte No. 230, Sub. No. 1,* as specifically recognized by the Commission, does not "conflict with the modification of authority herein made pursuant to criteria set forth in *National Auto Transporters Assn.—Declaratory Order*" (J.S. App. B. p. vi–xii), since *Ex Parte No. 230, Sub. No. 1* is specifically limited to TOFC service and at issue here is MLRC service.

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[3] Two other contentions of appellant may be dealt with summarily. The first (J.S. 18–19) is that the orders of the Commission granting Commercial's petition for modification are not supported by adequate findings. A similar contention was rejected by this Court in *Motor Convoy;* and the Commission's orders in the present case (J.S. App. B) specifically refer to the uncontroverted facts in Commercial Carrier's petition, to its prior decision in the NATA case and the criteria therein established, and to the *Motor Convoy* decision—thus making amply clear the basis upon which it was proceeding. The second contention (J.S. 3, 6, 9) is that the district court erred in refusing (J.S. App. A) to consider evidence outside the record made in the Commission proceeding. But consideration of such evidence clearly "would have been improper," since the court's review must be "limited to review of the evidence before the Commission." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 227.

[4] Petitions advancing similar contentions were rejected by the Commission in its order of January 20, 1960, in the *Motor Convoy* case, and such contentions were not pursued on judicial review.

CONCLUSION

This appeal presents no substantial issue that has not already been decided by this Court last Term in the *Motor Convoy* case. Plenary consideration is not warranted, and the judgment below should be affirmed.

Respectfully submitted.

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